

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
KENT COUNTY COURTHOUSE
DOVER, DELAWARE 19901
PHONE: (302) 739-4618**

**CHARLES W. WELCH, III
JUDGE**

April 26, 2010

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Wilmington, DE 19806

John S. Grady, Esq.
Grady & Hampton, LLC
6 North Bradford Street
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RE: A-1 Construction and Powerwashing, et al. v. Jefferson, et al.
C.A. No.: CPU5-09-000587

Decision on Motion to Amend Pretrial Stipulation

Dear Ms. Castro and Mr. Grady:

Plaintiffs-below, Appellees, Roy Jefferson and Kimberly Jefferson ("Plaintiffs"), have filed a Motion to Amend the Pretrial Stipulation ("Motion") to include \$2,477.00 in additional damages. Defendants-below, Appellants, Steven Reuter, Sherry Reuter, and A-1 Construction and Powerwashing ("Defendants"), object to the amendment.

The following are the pertinent facts concerning the Motion. This matter involves an appeal from the Justice of the Peace Court that was filed by the defendants on March 25, 2009. The parties engaged in discovery between October and December 2009, and on January 12, 2010, a Pretrial Stipulation and Order was filed with the Court. The trial date was originally scheduled for February 3, 2010, but, was continued at the Court's initiative. The current trial date is May 3, 2010, as agreed to by the parties and, then, confirmed by correspondence of the Court dated February 17, 2010. Plaintiffs provided Defendants with additional evidence, which is the subject of this Motion, on February 9, 2010, and filed this Motion on February 18, 2010. This evidence consists of receipts from LOB Renovations, Lowes, and Home Depot, totaling \$2,477.00, and an inspection report from Scott Engineering, Inc. The receipts are for expenses incurred in July and August 2009. The inspection report is dated September 26, 2008.

Defendants contend that the Motion seeks to add a cause of action and a series of facts not raised in the Justice of the Peace Court. However, this Court has previously ruled that additional damages incurred after trial in the Justice of the Peace Court may be sought in this Court, without violating the mirror image rule, if the claim on appeal is identical with the claim filed in the court below. *Rezak v. S&L Contractors, Inc.*, 2007

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WL 549905, at *1 (Del. Com. Pl.). In this case, Plaintiffs' claim in this Court is identical to the claim filed in the Justice of the Peace Court. Therefore, Plaintiffs' attempt to amend the Pretrial Stipulation to include additional damages does not violate the mirror image rule by adding a cause of action.

Plaintiffs assert that the Court should grant them leave to amend the Pretrial Stipulation in accordance with Court of Common Pleas Civil Rule 15(a), which provides that "leave [to amend a pleading] shall be freely given when justice so requires." In addition, Plaintiffs rely on Civil Rule 15(c)(2) for the assertion that the Court should allow the amendment because the new damages "relate back" to the original complaint. Civil Rule 15, however, applies only to amended and supplemental pleadings. The Pretrial Stipulation is not a pleading, and, therefore, the Court will not apply it in this situation.

After reviewing the Motion and the additional correspondence filed by the parties, the Court has determined that Court of Common Pleas Civil Rule 16(a)(6) controls. A Pretrial Stipulation and Order "when entered controls the subsequent course of the action, unless modified . . . to prevent manifest injustice." CCP Civ. R. 16(a)(6) (2010). The Court considers the following factors when a party argues that modification is necessary to prevent manifest injustice:

- (1) the prejudice or surprise in fact of the party against whom the proffered documents would have been submitted;
- (2) the ability of the party to cure the prejudice;
- (3) the extent to which waiver of the rule against admission of unlisted documents would disrupt the orderly and efficient trial of the case or of other cases in the court; and
- (4) bad faith and willfulness in failing to comply with the court's order.

Cuonzo v. Shore, 958 A.2d 840, 845-46 (Del. 2008). "[T]he guiding principle is whether the refusal to modify a pretrial order constitutes a manifest injustice which injustice 'must be balanced against any contention [by the nonmoving party] that to do so would unfairly prejudice [the nonmoving party].'" *Ness v. Graybeal*, 2009 WL 147021, at *3 (Del. Super.) (quoting *Wright v. Moore*, 953 A.2d 223, 226 (Del. 2007)).

The Court recognizes that its ruling on this Motion will impact the parties in the case going forward. Therefore, the Court must balance any injustice against Plaintiffs if the Motion is denied with any unfair prejudice to Defendants if the Motion is granted. Plaintiffs maintain that Defendants would not be prejudiced if the Court allows the Plaintiffs to introduce additional damages, but, the Court disagrees. The additional evidence Plaintiffs seek to introduce could, and perhaps should, have been provided to Defendants during discovery, but, was not. Defendants were not made aware of this

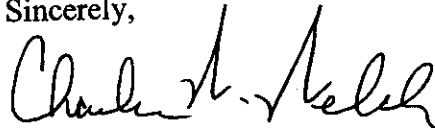
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additional evidence until February 9, 2010, nearly a week after the originally-scheduled trial date, and the Motion was not filed until February 18, 2010, after the May 3rd trial date had been scheduled.

If the Court granted Plaintiffs' Motion, discovery would have to be reopened to allow Defendants an opportunity to examine the evidence. This additional delay in the trial would unfairly prejudice Defendants. This prejudice outweighs any injustice to Plaintiffs, which was brought about by their own failure to provide Defendants with necessary evidence during discovery and before trial had been scheduled. Plaintiffs' Motion to Amend the Pretrial Stipulation and Order is therefore denied.

IT IS SO ORDERED.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles W. Welch, III". The signature is fluid and cursive, with the first name "Charles" and last name "Welch" being the most prominent parts.

Charles W. Welch, III

CWW:mek